

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ATLAS JENKINS, JR.,

Defendant and Appellant.

E064091

(Super.Ct.No. SWF1302498)

OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Kiefer, Judge.

Reversed.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, James Jenkins, is serving 11 years in state prison after a jury convicted him of transporting phencyclidine (PCP) and found true allegations that he had a prior

strike conviction and three prior prison term convictions. He argues his conviction should be reversed because the code section under which he was convicted, Health and Safety Code, section 11379.5, has since been amended to require proof that the transportation be for the purpose of sale. The People concede, and this court agrees, that the amended statute applies retroactively. The conviction is reversed and the People are permitted to retry appellant.

FACTS AND PROCEDURE

On September 17, 2013, a Hemet police officer conducted a traffic stop of a car defendant was driving because it had expired registration tags. The officer asked defendant to step out of the car so he could conduct a search. Defendant admitted to having PCP in the trunk of the car. The officer found two small vials of liquid PCP in the trunk, wrapped in a t-shirt.

On November 5, 2014, the People filed an information charging defendant with transporting PCP in violation of Health and Safety Code section 11379.5.¹ The People also alleged defendant had a strike prior (Pen. Code, §§ 667, subds. (c) &(e)1), 1170.12, subd. (c)(1)) and three prison term priors (Pen. Code § 667.5, subd. (b)).

On April 20, 2015, a jury convicted defendant as charged. On April 21, 2015, the trial court found true each of the allegations. On June 30, 2015, the trial court sentenced defendant to 11 years in state prison.

On July 24, 2015, defendant appealed.

¹ Section references are to the Health and Safety Code unless otherwise indicated.

DISCUSSION

At the time of defendant's conviction, section 11379.5 provided, in relevant part: "Every person who transports, imports into this state, sells, furnishes, administers, or gives away [PCP] . . . shall be punished" Courts had previously interpreted "transport" to include any movement of a controlled substance, whether for personal use or for sale. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.)

However, on July 13, 2015, Governor Brown signed Assembly Bill No. 730 (AB 730). Effective January 1, 2016, AB 730 (2015-2016 Reg. Sess.) amended sections 11360 (prohibiting the transport of marijuana), 11379.5, and 11391 (prohibiting the transport of mushrooms) by adding an identical subdivision (c) to each statute: "For the purposes of this section, 'transport' means to transport for sale." (Stats. 2015, ch. 77, § 1)² Thus, under the newly amended section 11379.5, a person can now be convicted only if he or she transports the PCP for sale. Transportation for personal use is no longer punished under section 11379.5. Here, the parties agree that the jury did not hear evidence that defendant transported the PCP for the purpose of sale, and so defendant could not now be convicted of violating section 11379.5 using the evidence presented at his trial.

² Effective January 1, 2014, this exact change was made to the statutes prohibiting the transport of numerous other controlled substances, including cocaine, heroin, and methamphetamine. (§§ 11352, 11379) (Assembly Bill No. 721, 2013-2014 Reg. Sess.) (AB 721) The Legislature more recently enacted AB 730 because it had "overlooked certain statutes in its deliberations," over AB 721, namely those regarding the transport of marijuana, PCP and mushrooms. (Assembly Floor Analysis, AB 730, 2015-2016 Reg. Sess.)

Further, all concerned agree that defendant benefits retroactively from the changes to section 11379.5. The general rule is that statutory amendments are not retroactive, unless expressly so stated by the Legislature. (*People v. Vinson* (2011) 193 Cal.App.4th 1190, 1195, Pen. Code, § 3). An exception exists, however, under *In re Estrada* (1965) 63 Cal.2d 740, 744-745, when an amendment has the effect of mitigating the punishment. When the amendment has such an ameliorative effect, then it is applied retroactively to all convictions not yet final on the effective date of the amendment. As the parties point out, California appellate courts have applied this reasoning to find retroactive the identical ‘transport for sale’ changes that the Legislature made to other controlled substance statutes when it enacted AB 721 (see fn. 2, *ante*, p. 3). (*People v. Ramos* (2016) 244 Cal.App.4th 99, 103; *People v. Eagle* (2016) 246 Cal.App.4th 275, 279.) Here defendant’s conviction was not yet final at the effective date of the amendment to section 11379.5. A judgment is not final until the time for petitioning for writ of certiorari in the U.S. Supreme Court has passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306.) Therefore, the changes made by AB 730 operate retroactively to defendant’s conviction.

We will remand the matter for further proceedings. “Where . . . evidence is not introduced at trial because the law at that time would have rendered it irrelevant, the remand to prove that element is proper [Citation.]” (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-72, fn. 2.) Here, the parties agree that the jury did not hear evidence that defendant transported the PCP for the purpose of sale, and so the People are permitted to retry defendant.

DISPOSITION

The conviction is reversed. Double jeopardy does not bar the People from retrying defendant on this charge.

NOT TO BE PUBLISHED IN OFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

SLOUGH
J.